



# Legal Views

- ❖ Current Issues
- ❖ Case Notes
- ❖ Counsel Help

Volume 10, Issue 9

*A Resource from Montgomery County's Office of the County Attorney*

September 2005

Douglas M. Duncan, County Executive

Charles W. Thompson, Jr., County Attorney

## In Our Opinion...

**Edward B. Lattner**

The Office of the County Attorney has established protocols to ensure that it provides timely and effective legal advice to its client agencies. A Montgomery County agency may ask its assigned attorney for legal advice regarding any aspect of its mission. In framing the request, the agency should consider whether it needs a formal County Attorney opinion or whether an informal response from the assigned attorney will suffice.

Broadly speaking, the Office provides two types of opinions. A formal County Attorney opinion is usually drafted by the staff attorney assigned to the requesting agency. That draft is then subject to a thorough review and editing process by other attorneys in the Office, knowledgeable about the subject matter, before the County Attorney adopts it as a formal opinion. In contrast, an informal opinion may take many forms—a phone conversation, an email, or a letter of advice—and is

*continued to page 2*

## Liability for Employees Gone Bad

**Sharon V. Burrell**

When is an employer liable for criminal acts of employees? The U.S. Court of Appeals for the Fourth Circuit recently addressed this issue in a case involving apparent road rage.

Ronnie Sasser and Stephen Meininger drove armored cars for Western Distributing Company. While transporting currency one day along I-95 in Baltimore, the two men attempted to cut off and to force Lloyd Jordan's car off the road. Meininger repeatedly aimed a sawed-off shotgun at Jordan and threatened to blow off his head. Maryland State Police stopped and arrested the two men. Each was charged with a gun violation and possession of marijuana. Meininger also was charged with assault. Sasser pleaded guilty to the possession charge and the State dismissed the weapon charge against him. Meininger was convicted of first degree assault and possession of marijuana.

Jordan sued the two men and Western. He alleged that Western was liable for negligence based on *respondeat superior* and for negligent hiring, training, supervision, and retention. The district court dismissed the *respondeat superior* claim and granted summary judgment to Western on the remaining claims. Jordan appealed.

Applying Maryland law, the Fourth Circuit found that the *respondeat superior* claim was properly dismissed because the employees' actions were not of the kind that they were hired to perform. Although the two men were on duty and used Western's guns and truck to terrorize Jordan, they were not attempting to advance Western's interests in any way.

## INSIDE THIS ISSUE

- 2 Get It In Writing – First!
- 3 Police Officers' Probationary Status

**Back to School! Watch for Children.**



strictly the product of the attorney assigned to the requesting agency. The Office has identified formal and informal opinions written since 1990 that are suitable for publication and offers them for sale on CD-ROM. Please contact Sherry Gemperle, Paralegal Specialist, if you are interested in purchasing one of these discs.

There have been times when agency employees asked for legal advice without the knowledge of the agency head. In order to ensure that the expenditure of legal resources is justified in light of agency priorities, a request for legal advice must come from the agency head or a division chief. Because additional resources are required to prepare a formal opinion, requests for a County Attorney opinion must come from an agency head.

The Office of the County Attorney strongly encourages staff attorneys and their client agencies to negotiate opinion deadlines up front. Where long-term projects are concerned, it is especially important for agencies to identify, early on, when legal review will be necessary to ensure that the project will meet its intended completion date.

Staff attorneys must concentrate their efforts on responding to requests from the County agencies that the law requires them to advise and represent and, therefore, cannot respond to requests for legal advice from private citizens or lawyers. Staff attorneys are routinely asked for legal advice on private matters. The Office of the County Attorney does not have the resources to spend the many hours of research and writing that is required to respond to private inquiries. Additionally, the County Charter prohibits the County Attorney and the attorney staff from engaging in any other practice of law. While a staff attorney may refer a private inquiry to the bar association's lawyer referral service, the attorney cannot answer a specific question. ❖



The Court also found in favor of Western on the direct negligence claims. Jordan asserted that Western was liable for negligent hiring and retention because Meininger had tested positive for drugs before he was hired and the company violated various safety regulations regarding substance abuse and drug testing. The Fourth Circuit ruled that the key issue was whether the employees' illegal conduct was foreseeable to Western. It found that Meininger's positive drug test was not enough for Western to foresee the later conduct. The Court also noted that there was no record of the employees engaging in violent behavior or complaints against them. And even if such conduct was foreseeable based on one failed drug test, Jordan did not establish proximate cause because he did not show that Sasser and Meininger were under the influence of drugs when they tormented him.

While one can sympathize with Mr. Jordan's trauma, under Maryland law, an employer simply is not responsible for the unforeseeable criminal conduct of its employees — even when they are on duty. ❖

*Jordan v. Western Distributing Co., et al.*, No. 04-1965 (4<sup>th</sup> Circuit, May 2, 2005).

## **Get It In Writing – First!**

### **Richard H. Melnick**

Under the statute of frauds, a contract that cannot be performed within one year is unenforceable unless the agreement “or some memorandum or note of it is in writing and signed by the party to be charged.”

The Maryland Court of Special Appeals recently considered whether a writing signed on behalf of a not-yet-existing corporation could later be used by that party to enforce an oral, multi-year contract. The court held that an oral contract satisfies the statute of frauds' writing requirement when accompanied by conduct that adopts a prior invalid written agreement.

Krause Marine Towing Corporation (Towing Corp.) sued Salisbury Building Supply, Inc. (Supply Co.) for breach of an oral contract to be performed over five years. The parties had seemingly entered a prior

*continued to page 4*

# Police Officers' Probationary Status Affects Rights Under LEOBR

**Jerome A. Nicholas, Jr.**

In a decision interpreting the Law Enforcement Officer's Bill of Rights (LEOBR), the Maryland Court of Appeals held that the Police Officer Rights Bill does not preclude permanently certified Maryland Police Training Commission Officers from being placed on probationary status by any subsequent employer police agency.

The LEOBR is a Maryland statute that provides procedural due process protection to sworn law enforcement officers facing police agency administrative charges. Among other due process rights, a sworn police officer who has completed probation with an agency is entitled to contest administrative charges by requesting a hearing.

A local town's sworn police officer left his employment with the town and joined the Maryland Department of State Police. Prior to joining the State Police Agency, the officer received police officer certification from the Maryland Police Training

Commission (MPTC). The MPTC is authorized by State law to certify individuals who meet its standards for law enforcement duty. Except under limited circumstances, a person who does not have the MPTC certification is prohibited from serving as a law enforcement officer in Maryland. The MPTC is also authorized to grant a person seeking certification a one year probationary appointment. Upon joining the Maryland Department of State Police, the officer qualified for MPTC certification. However, as a newly hired State Police Officer, he was required to be and placed on a two-year probation period.

During the officer's probationary period with the State Police, he was informed that he would be disciplined for violating certain agency rules. The officer requested a hearing under the LEOBR. He was advised by the Agency that no hearing would be granted because the officer was still on probation with the State Police. The officer's suit to seek an administrative hearing under the LEOBR was unsuccessful.

In affirming the lower Court's ruling in favor of the State Police Agency, the Court of Appeals rejected the officer's argument that his MPTC certification qualified him for an LEOBR hearing, as he was no longer on probation for purposes of the LEOBR. The Court reasoned that the MPTC probation period and some police hiring agencies' probation periods are applied with different purposes in mind. The MPTC probationary period allows a hiring police agency to employ persons until they have completed the required training and certification process. On the other hand, the police agency's probation period is imposed without regard to experience and training factors, but to give an agency head oversight of the police agency. Moreover, the Court concluded that it was unable to locate any statutory language that suggests the MPTC authority was intended as the only probation period that applied to the LEOBR. The Court said that, if they would accept the officer's interpretation of the LEOBR, it would have to insert language in the LEOBR. The Court was unwilling to do so.

A Montgomery County Police Officer remains on probation for a full 12 months from the date the officer attains sworn status. A police officer candidate's training takes six months and the training precedes the 12-month probationary period. ♦

*Mohan v. Norris*, 386 Md. 63 (2005).

Office of the County Attorney – Legal Views  
101 Monroe Street, 3<sup>rd</sup> Floor, Rockville, MD 20850  
(240) 777-6700  
<http://www.montgomerycountymd.gov/govtmpl.asp?url=/content/countyatty/index.asp>

## **Publisher**

*Charles W. Thompson, Jr., County Attorney*

## **Managing Editor**

*Janita R. Lillard, Paralegal Specialist*

## **Editorial Staff**

*Sharon V. Burrell*

*Betty N. Ferber*

*Karen L. Federman Henry*

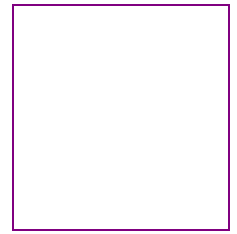
*Edward B. Lattner*

*Patricia P. Via*

**Legal Views** is a monthly newsletter prepared as part of the County Attorney's preventive law and education efforts. This information is not legal advice, but an informative tool. While we attempt to ensure the accuracy of information, the informal nature of Legal Views does not allow for thorough legal analysis. If you have an interest in a reported article, please contact us. If you wish to be placed on our mailing list, please send your request with your full name, address, and phone number.



Legal Views  
Office of the County Attorney  
101 Monroe Street, 3<sup>rd</sup> Floor  
Rockville, MD 20850



ADDRESS CORRECTION REQUESTED

***Get It In Writing***

*continued from page 2*

written agreement; however, they executed that contract before Towing Corp. filed its articles of incorporation. Consequently, the written contract was invalid. After Towing Corp. incorporated, the parties orally agreed to the same terms. The parties conducted business with one another under those provisions for approximately two years. Supply Co. then transferred most of its assets to another entity that did not honor the contract.

Towing Corp. sued Supply Co. for failing to perform for the required five years. Supply Co. argued that Towing Corp. could not enforce the written agreement, since that entity did not exist at the time of the agreement and the subsequent oral agreement, even if it was based on the prior, invalid written agreement, was barred by the statute of frauds. The court instructed the jury that: (1) the original written contract was meaningless, because it was executed by “somebody that was not yet born;” and (2) if it believed that the parties’ oral agreement and conduct over two years ratified the invalid written agreement, it could enforce the contract. The jury

found for the Towing Corp., the judge denied Supply Co.’s motion for judgment notwithstanding the verdict, and Supply Co. appealed.

Citing numerous authorities, the Court held that the signing of a memorandum for a multi-year agreement may predate the formation of an oral contract, and emphasized that a court should focus on the statute’s purpose of preventing fraudulent claims. After considering the pertinent facts, the Court affirmed the judgment, because enforcing the agreement would not subject Supply Co. to fraudulent claims and permitting a document that sets forth all of the agreement’s terms to serve as the required writing comports with the statute’s purpose. The court reasoned that the parties conducted business for two years in accordance with the prior memorandum, with no apparent disputes or misunderstandings. ❖

*Salisbury Building Supply Company, Inc. v. Krause Marine Towing Corp.*, 162 Md. App. 154, 873 A.2d 452 (May 2, 2005).